FILE COPY

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

Appellant,

v.

MARK AVRECH,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Supreme Court, U. S.
FILED
FEB 15 1974
MICHAEL RODAK, JR., CLERK

No. 73-206

JACOB J. PARKER, *et al.*,

Appellants,

v.

HOWARD B. LEVY,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

THOMAS M. COMERFORD
1301 Avenue of the Americas
New York, N. Y. 10019

DAVID L. FOX
280 Park Avenue
New York, N. Y. 10017

MARVIN M. KARPATKIN
1345 Avenue of the Americas
New York, N. Y. 10019

LEONARD P. NOVELLO
1 Chase Manhattan Plaza
New York, N. Y. 10005

Attorneys for the Association of the Bar of the City of New York
42 West 44th Street
New York, New York 10036

TABLE OF CONTENTS

	PAGE
Interest of the Amicus Curiae	2
Statutes Involved	3
Questions Presented	4
Statement of the Cases	4
Summary of Argument	4
Argument:	
Point I:	
Article 134 is unconstitutional on its face	6
A. Article 134 is unconstitutionally vague	7
1. Article 134 does not give fair warning of what conduct is proscribed	9
2. Article 134 fails to provide explicit enforcement standards	18
B. Article 134 is unconstitutionally overbroad	23
C. No countervailing military necessity	24
D. The effect of unconstitutionality	25
Point II:	
Article 133 is unconstitutional on its face	27
Conclusion	33

TABLE OF AUTHORITIES

Cases

Burns v. *Wilson*, 346 U.S. 137 (1953)	17
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	8
Brown v. *Board of Education*, 349 U.S. 294 (1954)	16

PAGE

Carter v. *McClaughry*, 183 U.S. 365 (1902) 17
Cline v. *Frink Dairy Co.*, 274 U.S. 445 (1927) 7
Coates v. *City of Cincinnati*, 402 U.S. 611 (1971) 7, 9, 22, 23, 24, 32
Connally v. *General Construction Co.*, 269 U.S. 385 (1926) 7, 8, 18
Corporation of Haverford College v. *Reeher*, 329 F. Supp. 1196 (E.D. Pa. 1971) 7

Dombrowski v. *Pfister*, 380 U.S. 479 (1965) 17, 24
Dynes v. *Hoover*, 61 U.S. (20 How.) 65 (1858) ... 15, 16, 17

Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966) 20-21, 31
Gooding v. *Wilson*, 405 U.S. 518 (1972) 7, 22, 24, 25, 31, 32
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 7, 8, 19, 21, 23, 31

Johnson v. *Zerbst*, 304 U.S. 458 (1938) 17

Kauffman v. *Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969) 17

Lanzetta v. *New Jersey*, 306 U.S. 451 (1938) 7, 9, 22, 23, 28, 31
Levy v. *Parker*, 396 U.S. 1204 (1969) 15, 26
Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 17

NAACP v. *Button*, 371 U.S. 415 (1963) 25

O'Callahan v. *Parker*, 395 U.S. 258 (1969) 26
Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972) 7, 8, 16, 22, 31

Reid v. *Covert*, 354 U.S. 1 (1957) 10
Roe v. *Wade*, 410 U.S. 113 (1973) 16

PAGE

. *Sanford*, 60 U.S. (19 How.) 393 (1857) 16

Bridge Company v. *United States*, 204 U.S. (1905) 10

States v. *Adams*, 21 C.M.R. 34 (AFBR) 14

States v. *Alexander*, 3 U.S.C.M.A. 346, 12 R. 102 (1953) 13

States v. *Annal*, 13 U.S.C.M.A. 427, 32 R. 427 (1963) 13

States v. *Berry*, 6 U.S.C.M.A. 638, 20 C.M.R. (1956) 13

States v. *Butler*, 11 C.M.R. 445 (ABR 1953) 14

States v. *Cardiff*, 344 U.S. 174 (1952) 7, 22

States v. *Caune*, 22 U.S.C.M.A. 200, 46 R. 200 (1973) 19

States Civil Service Commission v. *National ciation of Letter Carriers*, 413 U.S. 458) 8, 11, 12, 30

States v. *Cohen Grocery Co.*, 255 U.S. 81 1) 7

States v. *Cole*, 30 C.M.R. 755 (USCG Action General Counsel as Supervisory Authority) 14

States v. *Community TV Inc.*, 327 F.2d 797 h Cir. 1964) 7

States v. *Cowan*, 12 C.M.R. 375 (ABR 1953) 14

States v. *Cramer*, 8 U.S.C.M.A. 221, 24 R. 31 (1957) 13

States v. *Daniels*, 19 U.S.C.M.A. 529, 42 R. 131 (1970) 24

States v. *Davis*, 27 C.M.R. 908 (CGBR) 20

PAGE

United States v. *Day*, 11 U.S.C.M.A. 549, 29 C.M.R. 365 (1960) 19
United States v. *Downard*, 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1956) 20
United States v. *Eaton*, 144 U.S. 677 (1892) 10
United States v. *Fisher*, 6 C.M.R. 195 (ABR 1952) . 10
United States v. *Floyd*, 18 C.M.R. 362 (ABR 1954), *pet. denied*, 6 U.S.C.M.A. 817, 19 C.M.R. 413 (1955) 13, 14
United States v. *Francis*, 12 C.M.R. 695 (AFBR 1953), *pet. denied*, 3 U.S.C.M.A. 837, 13 C.M.R. 142 (1953) 20
United States v. *Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953) 8, 15
United States v. *Freeman*, 15 C.M.R. 639 (AFBR 1954), *pet. denied*, 4 U.S.C.M.A. 734, 16 C.M.R. 292 (1954) 20
United States v. *George*, 228 U.S. 14 (1913) 10
United States v. *Goldie*, 1 C.M.R. 495 (NBR 1951) 14
United States v. *Gray*, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970) 24
United States v. *Grimaud*, 220 U.S. 506 (1911) 10
United States v. *Habbard*, 12 C.M.R. 492 (AFBR 1953) 20
United States v. *Harbin*, 20 C.M.R. 925 (AFBR 1955) 14
United States v. *Herndon*, 15 U.S.C.M.A. 510, 36 C.M.R. 8 (1965) 13
United States v. *Holt*, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957) 10, 13
United States v. *Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) 8, 24, 32
United States v. *Hunt*, 18 C.M.R. 498 (ABR 1954) 13

PAGE

ited States v. *Jackson*, 8 C.M.R. 215 (ABR 1952), et. *denied*, 2 U.S.C.M.A. 677, 8 C.M.R. 198 (1953) 14
ited States v. *Johnson*, 5 C.M.R. 268 (ABR 1952) 20
ited States v *Lee*, 4 C.M.R. 185 (ABR 1952), *pet. denied*, 1 U.S.C.M.A. 712, 4 C.M.R. 173 (1952) .. 14
ited States v. *LeFort*, 15 C.M.R. 596 (CGBR 954) 20
ited States v. *Livingston*, 8 C.M.R. 206 (ABR 952), *pet. denied*, 1 U.S.C.M.A. 676, 8 C.M.R. 178 (1953) 14
ited States v. *Mallory*, 17 C.M.R. 409 (ABR 1954) 14
ited States v. *Manos*, 8 U.S.C.M.A. 734, 25 C.M.R. 238 (1958) 19-20
ited States v. *Martinson*, 21 U.S.C.M.A. 109, 44 C.M.R. 163 (1971) 13
ited States v. *Maze*, 42 C.M.R. 376 (ACMR (1970), *rev'd on other grounds*, 20 U.S.C.M.A. 29, 4 C.M.R. 29 (1971) 13
ited States v. *McCormick*, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960) 11, 22
ited States v. *Menta*, 39 C.M.R. 956 (AFBR 968) 20
ited States v. *Neill*, 4 C.M.R. 221 (ABR 1952), et. *denied*, 2 U.S.C.M.A. 665, 5 C.M.R. 130 (1952) 14
ited States v. *Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 6 (1953) 20
ited States v. *Ortega*, 45 C.M.R. 576 (ACMR 972) 13
ited States v. *Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972) 24
ited States v. *Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963) 13

PAGE

United States v. *Reese*, 92 U.S. 214 (1875) 7, 22
United States v. *Rio Poon*, 26 C.M.R. 830 (CGBR 1958) 20
United States v. *Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964) 13
United States v. *Sanchez*, 11 U.S.C.M.A. 218, 29 C.M.R. 32 (1960) 13
United States v. *Schneider*, 27 C.M.R. 566 (ABR 1958) 20
United States v. *Unrue*, U.S.C.M.A. , 46 C.M.R. 1326 (Misc. Doc. 1973) 15
United States v. *Shoenberg*, 16 U.S.C.M.A. 425, 37 C.M.R. 45 (1966) 13
United States v. *Siniger*, 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1956) 20
United States v. *Smart*, 12 C.M.R. 825 (AFBR 1953) 20
United States v. *Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952) 13
United States v. *Walker*, 21 U.S.C.M.A. 376, 45 C.M.R. 150 (1972) 16
United States v. *Walter*, 11 C.M.R. 355 (ABR 1953), *rev'd on other grounds*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954) 20
United States v. *Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956) 20
United States v. *White*, 7 C.M.R. 764 (AFBR 1953) 14
United States v. *Will*, 25 C.M.R. 674 (ABR 1958) .. 20
United States v. *Witzell*, 12 C.M.R. 269 (ABR 1953) 14
United States v. *Wolverton*, 10 C.M.R. 641 (AFBR 1953) 20
United States v. *Woodard*, 17 C.M.R. 813 (AFBR 1954) 14
Viereck v. *United States*, 318 U.S. 236 (1943) 10

PAGE

CONSTITUTION AND STATUTES

United States Constitution, First Amendment 7, 23, 24, 32
United States Constitution, Fifth Amendment 6, 8, 12, 22
5 U.S.C. § 7324(a)(2) 11
18 U.S.C. § 13 3
Article XXXII—Rules for Government of the Navy, enacted 23 April 1800, 2 Stat. 45 15
Article of War, Article 97, 18 Stat. 1342 (1874) ... 17
Uniform Code of Military Justice:
Articles 15-20 (10 U.S.C. §§ 815-820) 19
Article 34(a) (10 U.S.C. § 834(a)) 19
Article 36(a) (10 U.S.C. § 836(a)) 11
Article 56 (10 U.S.C. §856) 11
Article 133 (10 U.S.C. § 933) .....*passim*
Article 134 (10 U.S.C. § 934) .....*passim*
5 C.F.R. § 733 11

OTHER AUTHORITIES

Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation pursuant to the Uniform Code of Military Justice for the period January 1, 1972, to December 31, 1972 26
Department of the Army Pamphlet 27-9, Paragraph 4-122, "Military Judges' Guide" (1969) 21, 31
Department of the Army Regulation 350-212, "Training: Military Justice" (2 June 1972) .. 18
Department of the Army Subject Schedule 21-10, "Military Justice (Enlisted Personnel)", (24 June 1969) 18

PAGE

Gaynor, *Prejudicial and Discreditable Military Conduct, A Critical Appraisal of the General Article*, 22 *Hastings L. J.* 259 (1971) 27

Hodson, *Perspective, the Manual for Courts-Martial, 1984*, 47 *Mil L Rev.* 1 (1972) 26

Manual for Courts-Martial, United States (rev. ed. 1969)

Paragraph 26*b* 32
Paragraph 32 19
Paragraph 73*a* 21
Paragraph 127*c* 10
Paragraph 212 ..... 28, 31
Paragraph 213*b* 9, 10
Paragraph 213*c* 10
Paragraph 213*d* 21
Paragraph 213*f* 10
Appendix 6—Forms for Charges and Specifications 10

Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service*, 35 *Notre Dame Lawyer* 401 (1960) 24

Reynolds, *The Officer's Guide (1969)* 29

Note, *Taps for the Real Catch-22*, 81 *Yale L. J.* 1518 (1972) 10, 29, 32

Task Force on the Administration of Military Justice in the Armed Forces (1972) 26

Wiener, *Are The General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968) .. 27

Wiener, *Courts-Martial and the Bill of Rights, The Original Practice II*, 72 *Harv. L. Rev.* 266 (1958) 16

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1713

SECRETARY OF THE NAVY,

Appellant,

v.

MARK AVRECH,

Appellee.

N APPEAL FROM THE UNITED STATES COURT
F APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

No. 73-206

JACOB J. PARKER, *et. al.*,

Appellants,

v.

HOWARD B. LEVY,

Appellee.

APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Association of the Bar of the City of New York
s this brief pursuant to Rule 42 of the United States
preme Court. Both appellants and appellees have con-
ted to the filing of this brief, and copies of their consents
e been filed with the Clerk of this Court.

Interest of the *Amicus Curiae*

The Association of the Bar of the City of New York ("The Association") has a membership of more than 10,200 attorneys admitted to practice in New York and elsewhere. The Association was established by Act of the New York State Legislature in 1871. Laws 1871, Chapter 819; Amended Laws 1924, Chapter 134. Its stated statutory purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standing of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof."

The Committee on Military Justice and Military Affairs is a Standing Committee of the Association, appointed by the President of the Association. There are at present 24 members of the Association on the Committee. The Chairman is Marvin M. Karpatkin, an active practitioner in this field, who is a General Counsel of the American Civil Liberties Union and an Adjunct Professor of Law at New York University School of Law. Other members include a law school dean, a judge of the Criminal Court of the City of New York, and the General Counsel of the NAACP. Two of the members are currently on active duty practicing criminal law in the Army Judge Advocate General's Corps; most of the members are former members of the armed services, many of them of the legal branches of those services; one is a recently retired Captain in the U.S. Coast Guard whose last assignment was Chief Legal Officer at the largest Coast Guard installation in the country, Governor's Island; and many of the members have, as military and civilian lawyers, represented servicemen and servicewomen.

Committee's Subcommittee on the Uniform Code
ry Justice was asked by the Chairman of the Com-
study the constitutionality of Article 133 (Con-
ecoming an Officer and a Gentleman) and Article
neral Article) of the Uniform Code of Military
After due consideration, an overwhelming ma-
the Subcommittee decided that Article 133 and
two clauses of Article 134 were unconstitutionally
d overbroad, and this finding was adopted by an
ming majority of the Committee at its December
eting. The Association believes that the Commit-
vs will be helpful to this Court in resolving one of
gal issues presented by the appeals at bar, and has
the Committee permission to file this brief in its

Statutes Involved

le 133 of the Uniform Code of Military Justice
C. § 933) provides in pertinent part:

> Any commissioned officer . . . who is convicted
> conduct unbecoming an officer and a gentleman
> all be punished as a court-martial may direct.

le 134 of the Uniform Code of Military Justice
C. § 934) provides in pertinent part:*

> Though not specifically mentioned in this chap-
> r, [1] all disorders and neglects to the prejudice
> good order and discipline in the armed forces,

hird clause of Article 134 provides trial by court-martial
s and offenses not capital." This clause is used to charge
f federal law not elsewhere proscribed in the Uniform Code
Justice, and violations of state law incorporated under the
e Crimes Act, 18 U.S.C. § 13. Although this clause was
in the opinion of the Third Circuit in the *Levy* case, 478
0, we do not believe it is involved in these appeals, and we
ews as to its constitutionality. References in this brief to
4" are meant to encompass only the first two clauses.

> [and] [2] all conduct of a nature to bring discredit upon the armed forces . . . shall be taken cognizance of by general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Questions Presented

1. Whether Article 133 and Article 134 of the Uniform Code of Military Justice are unconstitutionally vague and overbroad.

2. In the case of a felony prosecution, should the armed services be held to the requirement of specificity imposed on civilians?

Because of the parties' individual interests and their exhaustive treatment of all of the issues involved in these appeals, we confine ourselves to discussion of the issues we consider most important as a matter of constitutional policy: the facial constitutionality of Article 133 and Article 134. We will not discuss the other issues raised or briefed by the parties.

Statement of the Cases

Amicus incorporates the statement of the *Avrech* case as outlined in Appellee Avrech's brief, and the statement of the *Levy* case as outlined in the Appellant government's brief.

Summary of Argument

A statute which either forbids or requires the performance of an act in terms which are so vague that the average reasonable man is forced to guess at its meaning, interpretation, and application, is unconstitutionally vague and overbroad, and violates due process of law.

I

Article 134 is so broad in scope that it gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities.

Furthermore, although the *Manual for Courts-Martial, United States* (rev. ed. 1969), hereinafter referred to as *Manual*, (the administrative regulations governing military discipline which have been promulgated pursuant to the Uniform Code of Military Justice) does contain a number of precise specifications which can be used to charge a serviceman or servicewoman with a crime, administrative regulations cannot be used to validate an otherwise unconstitutional statute. In addition, the specifications in the *Manual* are not all encompassing; they are only examples of conduct which might be considered to come under the Article. Accordingly, the Article as applied represents a limitless catchall, without a unifying theme, for various types of vague misconduct not otherwise codified, ranging from abusing animals to wearing unauthorized insignia.

Moreover, there is no valid countervailing military justification for suspending the application of the constitutional right of fair warning to a penal statute which prescribes serious criminal penalties to offenders, as opposed to administrative sanctions. The good order and discipline necessary to accomplish the mission of the armed services can be achieved by means of a statute more clearly in accord with constitutional guidelines.

Thus, this Article is unconstitutionally vague and overbroad.

II

Article 133, which applies only to officers, suffers from the same vagueness and lack of military justification as Article 134. In addition, neither this Article nor the *Manual* explain what conduct "unbecomes" an officer or a gentleman. Moreover, the word "gentleman" is a highly subjective, amorphous term and open to abuse. It is unclear who is to decide what is or is not "gentlemanly" conduct, especially in a time of changing values and mores. There is grave doubt that the statute gives fair notice of the crimes intended to be covered.

Thus, this Article is unconstitutionally vague and overbroad.

ARGUMENT

POINT I

Article 134 is unconstitutional on its face.

We submit that the convictions of appellees for violation of Articles 133 and 134 in the instant cases must be held violative of the due process clause of the Fifth Amendment because the statute is unconstitutionally vague and overbroad.[1]

At the outset, it is important to recognize that although both of the instant cases are "free speech" cases, we do not confine our argument to that area of constitutional interpretation. Rather, unfettered by partisan interests, we urge that this Court rule in these cases on strict constitutional policy grounds. This Court has held a hard line against vague criminal statutes which offend the constitutional norm of due process. Moreover, this Court has not limited it application of the vagueness doctrine to "free speech" cases; decisions abound concerning vague statutes

1. As to the question of retroactivity, *see* note 14 *infra*.

which seek to regulate a wide range of activities, both within and without the context of the First Amendment. *Gooding* v. *Wilson*, 405 U.S. 518 (1972) (free speech); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy law); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971) (freedom of association); *United States* v. *Cardiff*, 344 U.S. 174 (1952) (FDA inspection statute); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1938) ("gangster" label statute); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927) (anti-trust profit controls); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926) (minimum wage law); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 (1921) (price controls); and *United States* v. *Reese*, 92 U.S. 214 (1875) (statute describing violations of the Fifteenth Amendment by election officials).[2]

We suggest that the Court's holding in the cases at bar need not be restricted to a decision on First Amendment grounds. Rather, as we point out *infra*, Articles 133 and 134 do not meet constitutional standards of due process for reasons in addition to their capacity to stifle exercise of First Amendment freedoms. For that reason we meet the question of facial constitutionality of these statutes considering that their infirmity goes far beyond even the important First Amendment considerations.

A. Article 134 is unconstitutionally vague.

The requirement for specificity in drafting criminal statutes is a "basic principle of due process." *Grayned* v.

2. Other federal courts have also applied the vagueness concept in areas other than free speech. *See Corporation of Haverford College* v. *Reshe*r, 329 F. Supp. 1196 (E.D. Pa. 1971) (state statute denying financial aid to convicted misdemeanants). *See also United States* v. *Community TV, Inc.*, 327 F. 2d 797 (10th Cir. 1964) (excise tax laws must be applied on the basis of specific description of transaction covered, not by analogy).

City of Rockford, 408 U.S. 104, 108 (1972). Thus, a criminal statute must give fair warning to the citizenry of what conduct is prohibited. If the statute is drawn "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application", it will be held violative of "the first essential of due process of law." (citations omitted) *Connally* v. *General Construction Co.*, *supra*, 269 U.S. at 391. Furthermore, a criminal statute must present those who apply it with "explicit standards" for application in order to prevent "arbitrary and discriminatory enforcement of the law." *Papachristou* v. *City of Jacksonville; Grayned* v. *City of Rockford, supra.*

These principles are part of the very fibre of the due process clause of the Fifth Amendment, and have been reaffirmed by this Court most recently in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). *See United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973). Moreover, the standards applied by this Court in the civilian context have been held applicable as well to statutes governing the conduct of military personnel. *United States* v. *Howe*, 17 U.S.C.M.A. 165, 176-79, 37 C.M.R. 429, 440-43 (1967). *See also United States* v. *Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953).

Accordingly we submit that the terms of Article 134, prohibiting "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces" do not meet the requirements of fair warning and establishment of ascertainable standards for enforcement. Thus, Article 134 is unconstitutionally vague and offends the basic principles of due process required by the Fifth Amendment.

1. Article 134 does not give fair warning of what conduct is proscribed.

On its face, the statute gives no notice to the serviceman from which he may determine what type of conduct is "prejudicial to good order and discipline" or service-discrediting. Appellant argues however, that this "generalized language . . . gains meaning from and embodies the well-settled customs and practices of the military community; and that those members therefore have sufficient notice of what conduct is prohibited by the Article. (Appellant's Brief in *Avrech* at 27). We submit that careful examination of the components of the "customs and practices of the military community" does not support that conclusion.

Appellant has relied specifically on the provisions of the *Manual* and the body of military and civilian case law interpreting the general article (Appellant's Brief in *Avrech* at 28). Reliance on the *Manual* to fill the void created by the vague facial language of Article 134 is unsatisfactory. First, it is doubtful whether resort may be had to such a publication for this purpose, for, as this Court has held, if a statute is vague on its face, "specification of the details of the offense[s] intended to be charged would not seem to validate it." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1938). *See also Coates* v. *City of Cincinnati, supra.* In any event, the *Manual* itself does not satisfy due process notice requirements because it is open-ended and does not contain a description of all offenses which may be punished under this Article.

The *Manual*, as a general guide, states that prosecution under the first clause of Article 134 is limited to cases in which the prejudice to good order and discipline is "reasonably direct and palpable" (paragraph 213*b*), and that, the second clause of the Article is intended to proscribe conduct which "has a tendency to bring the service into

disrepute or which tends to lower it in public esteem" (paragraph 213*c*). But these terms suffer from the same vagueness problem as the language of Article 134 itself. How is the serviceman to know what conduct constitutes a "reasonably direct and palpable" prejudice to good order and discipline? How is he to know which of his acts will have a "tendency to bring the service into disrepute?" Examination of the *Manual's* sixty-three model specifications under this Article (Appendix 6c), the discussion of fourteen of the offenses in some detail (in paragraph 213*f*), and the listing of many of those and other offenses in the Table of Maximum Punishments (paragraph 127*c*), is unsatisfactory because the list is not intended to be exclusive, but is purposely "elastic." *United States* v. *Fisher*, 6 C.M.R. 195, 199 (ABR 1952). *See also United States* v. *Holt*, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957). Indeed, the *Manual* and Article 134 themselves restrict the punishable offenses only by noting that they must be "not specifically mentioned" in another article of the Code (*Manual*, paragraph 213*b*).

Reference to the *Manual* to give definition to Article 134 is unsatisfactory also because the *Manual* is promulgated pursuant to Executive Order and does not constitute a body of substantive law. Such a procedure would raise serious constitutional questions.[3] The United States Court

3. We agree with appellant's position that "The status of the *Manual's* specifications as substantive military law is unsettled" (Appellant's Brief in *Avrech* at 30, n. 14). *See Reid* v. *Covert*, 354 U.S. 1, 38 (1957). However, we urge this Court to reject a scheme whereby the Executive may legislate substantive criminal conduct, a task traditionally and rightly within the exclusive province of the Congress. In this regard *see* Note, *Taps for the Real Catch-22*, 81 Yale L.J. 1518, 1523-24 (1972). *See United States* v. *Eaton*, 144 U.S. 677 (1892); *Viereck* v. *United States*, 318 U.S. 236, 241 (1943); *United States* v. *George*, 228 U.S. 14 (1913); *United States* v. *Grimaud*, 220 U.S. 506 (1911); *Union Bridge Company* v. *United States*, 204 U.S. 364 (1905).

of Military Appeals itself has recognized that there is no "basis for the proposition that the President may create an offense under the Code". *United States* v. *McCormick*, 12 U.S.C.M.A. 26, 28, 30 C.M.R. 26, 29 (1960). Thus, this Court should not allow reference to the *Manual* to define offenses under the general article in the absence of legislative provision for such reference. Congress has directed only that the President establish rules of procedure and evidence and fix maximum penalties, 10 U.S.C. §§ 836 and 856 (1970). He has done this in the *Manual* under Articles 36(a) and 56 of the Uniform Code of Military Justice, respectively. Nothing in the President's statutory grant of power permits the establishment of substantive criminal offenses. In any event, as discussed *infra*, the open-ended list of Article 134 offenses in the *Manual* may give notice of what has been punished on occasion in the past, but gives no warning of what other types of conduct will be considered proscribed in the future.

Contrary to the appellant's position (Brief in *Avrech* at 31), this Court's recent decision in *Letter Carriers*, *supra*, does not resolve the problem in the instant cases. That case held that a provision of the Hatch Act, 5 U.S.C. § 7324(a)(2) was not void for vagueness, in part because it gave notice of a listing of prohibited and permitted activities contained in Civil Service Commission Regulations, 5 C.F.R. § 733. It is important to note that, unlike the *Manual*, the Civil Service Regulations do not purport to proscribe conduct which will lead to criminal prosecution. Indeed, the penalty for violation of the Hatch Act provision is removal from government service. While in itself a stringent punishment, such a sanction does not approach the deprivation of liberty and imposition of a punitive discharge which may result from a federal court-martial conviction. While in general there is no right to

employment with the federal government, the Fifth Amendment grants the right not to be tried, convicted or incarcerated without due process of law. Thus, the requirement for strict construction of penal statutes present in the instant cases was not present in *Letter Carriers*. Further, Congress specifically intended the Civil Service Commission to exercise a rule-making function for the political conduct of federal employees, although that power did not give the Commission a "subordinate legislative role in fashioning a more expansive definition of the kind of conduct that would violate [the statute]," *Id.*, 413 U.S. at 571-72. In the case of the *Manual*, however, the list of substantive Article 134 crimes adopted by the President reflects the exercise of a legislative role which exceeds his delegated powers. Indeed, the changes in the Manual in 1968 and 1969 reflect an effort at a "more expansive definition" of conduct prohibited under the general article.[4] Thus, a result in the instant cases which rejects resort to the *Manual* as an enactment of substantive Article 134 offenses would *not* conflict with the holding in *Letter Carriers*. The statutes, regulations and their purposes involve different policy considerations. We deal here with penal sanctions for criminal conduct, requiring the ultimate in specificity and strict statutory construction. *Letter Carriers* simply does not apply.

After the serviceman has been unable to determine from the *Manual* what conduct Article 134 proscribes, he is urged to examine the cases which have interpreted this Article (Appellant's Brief in *Avrech* at 28). However,

4. For example, the Article 134 crimes of obstructing justice, gambling with enlisted men, cohabitation, and burning with intent to defraud were not mentioned in the 1951 *Manual for Courts-Martial* but are included in the Table of Maximum Punishments in the *Manual* and model specifications are provided therefor.

the cases give little idea of what to expect by way of prosecution, for they interpret Article 134 to permit trial for a myriad of offenses not listed or even hinted at in the *Manual*.[5] While a reading of the cases and the *Manual*

5. There are actually seventy-six offenses listed in the Table of Maximum Punishments for Article 134. Paragraph 127, *Manual for Courts-Martial*. The following offenses not listed in the *Manual* have been held violative of either or both of the first two clauses of Article 134:

Court of Military Appeals: Endangering military property even though no damage inflicted, *United States* v. *Martinson*, 21 U.S.C.M.A. 109, 44 C.M.R. 163 (1971); window peeping, *United States* v. *Shoenberg*, 16 U.S.C.M.A. 425, 37 C.M.R. 45 (1966); making telephone calls without paying, an offense which the court noted "sounded" in larceny, but even if not a "crime", it was serious service-discrediting conduct, *United States* v. *Herndon*, 15 U.S.C.M.A. 510, 36 C.M.R. 8 (1965); wrongfully jumping into the sea from an aircraft carrier, *United States* v. *Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964); assaulting a specialist (as opposed to a non-commissioned officer) in the execution of his office, *United States* v. *Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963); embracing another man, *United States* v. *Annal*, 13 U.S.C.M.A. 427, 32 C.M.R. 427 (1963); bestial acts with a chicken, *United States* v. *Sanchez*, 11 U.S.C.M.A. 218, 29 C.M.R. 32 (1960); defiling the flag, *United States* v. *Cramer*, 8 U.S.C.M.A. 221, 24 C.M.R. 31 (1957); cheating at calling out bingo numbers, *United States* v. *Holt*, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957); engaging in sexual intercourse in the presence of others (the couple in the next bed), *United States* v. *Berry*, 6 U.S.C.M.A. 638, 20 C.M.R. 325 (1956); accepting money to transport a Korean female in a government vehicle, *United States* v. *Alexander*, 3 U.S.C.M.A. 346, 12 C.M.R. 102 (1953); soliciting, without pay, other enlisted men to engage in sexual intercourse with a female, *United States* v. *Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

Army Court of Military Review: Homosexual conduct not amounting to sodomy, *United States* v. *Ortega*, 45 C.M.R. 576 (ACMR 1972); altering an official document without intent to defraud, *United States* v. *Maze*, 42 C.M.R. 376 (ACMR 1970), *rev'd on other grounds*, 20 U.S.C.M.A. 29, 44 C.M.R. 29 (1971); resisting civil apprehension, *United States* v. *Hunt*, 18 C.M.R. 498 (ABR 1954); mistreating fellow POWs, *United States* v. *Floyd*, 18 C.M.R. 362 (ABR 1954), *pet. denied*, 6 U.S.C.M.A. 817, 19 C.M.R. 413

(Footnote continued on next page)

may give some idea what conduct was proscribed in the past, there is still no fair warning of what conduct is considered criminal today (nor was there then to those convicted in the cases listed in note 5, *supra*).

To solve the notice question of what conduct will be currently proscribed under Article 134, it has been argued that military men will know from the customs and traditions of the service what standard of conduct is expected of them in order to avoid prosecution under Article 134. In this regard, the Court of Military Appeals, citing the

---

(Footnote continued from previous page)

(1955); associating with a notorious prostitute, *United States* v. *Mallory*, 17 C.M.R. 409 (ABR 1954); soliciting and accepting money for showing an obscene movie, *United States* v. *Cowan*, 12 C.M.R. 375 (ABR 1953); borrowing from an enlisted man, *United States* v. *Witsell*, 12 C.M.R. 269 (ABR 1953); operating a bawdy house in government quarters, *United States* v. *Butler*, 11 C.M.R. 445 (ABR 1953); soliciting an enlisted man to go AWOL, *United States* v. *Jackson*, 8 C.M.R. 215 (ABR 1952), *pet. denied*, 2 U.S.C.M.A. 677, 8 C.M.R. 198 (1953); drinking with enlisted men, *United States* v. *Livingston*, 8 C.M.R. 206 (ABR 1952), *pet. denied*, 1 U.S.C.M.A. 676, 8 C.M.R. 178 (1953); masturbating in the presence of children, *United States* v. *Neill*, 4 C.M.R. 221 (ABR 1952), *pet. denied*, 2 U.S.C.M.A. 665, 5 C.M.R. 130 (1952); officer found in his apartment with enlisted man's wife during early morning hours, *United States* v. *Lee*, 4 C.M.R. 185 (ABR 1952), *pet. denied*, 1 U.S.C.M.A. 712, 4 C.M.R. 173 (1952).

Air Force Court of Military Review: Inducing others to commit masturbation, *United States* v. *Adams*, 21 C.M.R. 734 (AFBR 1956); making obscene telephone calls, *United States* v. *Harbin*, 20 C.M.R. 925 (AFBR 1955); procuring a miscarriage, *United States* v. *Woodard*, 17 C.M.R. 813 (AFBR 1954); soliciting funds to act as defense counsel in a court-martial, *United States* v. *White*, 7 C.M.R. 764 (AFBR 1953).

Navy Court of Military Review: Striking another person in the Navy, *United States* v. *Goldie*, 1 C.M.R. 495 (NBR 1951).

Coast Guard: Chief Petty Officer having a female in his quarters at midnight, *United States* v. *Cole*, 30 C.M.R. 755 (USCG Action of General Counsel as Supervisory Authority 1961).

nual as an example, has held that Article 134 has "ac-ired the core of a settled and understandable content of eaning." *United States* v. *Frantz, supra*, 7 C.M.R. at 39. us, that Court reasoned, because Article 134 has been ed in military law since before the American Revolu-n,[6] it must be considered "not *in vacuo*, but in the con-t in which the years have placed it." *Id.*

This argument seemingly finds support in *Dynes* v. *over*, 61 U.S. (20 How.) 65 (1858), which held that the edecessor of the general article was not void for vague-ss because the article involved (Article XXXII, Rules r Government of the Navy, enacted 23 April 1800, 2 at. 45, 49) covered crimes that had been recognized as ch "by the usages in the navy of all nations" and because hat the crimes are and how they are to be punished, is ll known to practical men in the navy and army and by se who have studied the law of courts-martial." *Id.* at . Indeed, the Court of Military Appeals has refused to consider the constitutionality of Article 134, considering elf bound by the "precedent" of *Dynes*.[7] We submit that liance upon *Dynes* as precedent for the constitutionality the present general article is completely misplaced, as monstrated by the Court below in *Levy* v. *Parker, supra*, 8 F.2d at 785-88. Put simply, times have changed. hile "practical men" in the service of their country in the neteenth century may have been aware of the conduct oscribed by the general article of 1800, the same is rdly true today. Indeed, the sheer number of new and listed offenses under current military laws demonstrates

6. The history of this Article is amply discussed by the Circuit urts below, in *Levy*, 478 F.2d at 784; in *Avrech*, 477 F.2d at 40-41.

7. *United States* v. *Unrue*, U.S.C.M.A. , 46 C.M.R. 1326 lisc. Doc. 1973).

the improbability of such awareness.[8] Furthermore, in 1858 and throughout most of the nineteenth century the standing Army and Navy of the United States numbered in the hundreds. The pay was miserable and military service attracted only the dregs of society in the lower enlisted ranks. *See* Wiener, *Courts-Martial and the Bill of Rights, The Original Practice II*, 72 Harv. L. Rev. 266, 292, 301-02 (1958). The concept of a standing Army and Navy numbering in the millions, most of them conscripts, was totally foreign to the nineteenth century American thought. Surely rules which may have been necessary and proper for regulating the armed forces 115 years ago can no longer be assumed valid today, *ipso facto*. Any society which permitted the existence of the "peculiar institution", slavery, could hardly be expected to be overly concerned about the constitutional rights of soldiers and sailors. Wiener, *supra*, at 293.

This Court has consistently rejected the argument that contemporary interpretation of the Bill of Rights is dictated be standards which existed in times past. *See e.g., Roe* v. *Wade*, 410 U.S. 113 (1973) (abortion case) and *Papachristou* v. *City of Jacksonville*, *supra* (Elizabethan poor laws cannot be used to uphold vagrancy statutes because such theories no longer fit the facts). *See also United States* v. *Walker*, 21 U.S.C.M.A. 376, 45 C.M.R. 150 (1972) (concept that as times and facts change so must the reading of the Constitution fundamental to our system of government). Compare *Scott* v. *Sanford*, 60 U.S. (19 How.) 393 (1857) with *Brown* v. *Board of Education*, 349 U.S. 294 (1954). (It is interesting to note that Justice McLean, the sole dissenter in *Dynes*, was also one of the two dissenters in the *Dred Scott* case).

8. *See* note 5, *supra*.

Finally, the scope of review by federal courts has creased greatly since *Dynes* was decided. *See Burns Wilson*, 346 U.S. 137 (1953); *Johnson* v. *Zerbst*, 304 S. 458 (1938). In *Dynes*, the Court followed the usual actice of applying strict common law rules of pleading d practice to *all* cases, civilian or military. *See Ex parte illigan*, 71 U.S. (4 Wall.) 2 (1866). Moreover, a court-arital conviction for a violation of an Article of War which nstituted a "neglect or disorder" did not subject the cused to imprisonment in a penitentiary. Articles of War, rticle 97, 18 Stat. 1342 (1874); *Carter* v. *McClaughry*, 183 S. 365, 376 (1902). Hence the primary vehicle for llateral attack of any conviction, *habeas corpus*, was not ailable for those who had been convicted of a "neglect or sorder" by courts-martial. Federal jurisdiction is no nger dependent upon these common law rules. *Dombrow-i* v. *Pfister*, 380 U.S. 479 (1965); *Kauffman* v. *Secretary the Air Force*, 415 F.2d 991 (D.C. Cir. 1969).

The only conclusion that can be drawn is that it is mpletely inappropriate to rely on a case over 115 years d in making a determination whether or not the present neral article is unconstitutionally vague and overbroad. ot only have society and the Army radically changed dur-g this time but so has the article itself and the law ap-icable to it. Indeed, the mercurial nature of the applica-on of Article 134 is the quintessence of its constitutional firmity.

One method by which Congress has attempted to hieve some modicum of notice concerning the meaning Article 134 is the provision in Article 137 that, among her provisions, the punitive articles (i.e. Articles 77 rough 134) "shall be carefully explained to each enlisted ember at the time of his entrance on active duty, or

within six days thereafter. They shall be explained again after he has completed six months of active duty, and again at the time when he reenlists." The crucial question arises as to what constitutes a "careful explanation" of Article 134. The Army, for example, devotes a total of only *twenty minutes* to an explanation of Articles 71-134 during the first six days of enlisted basic training. The re-explanation six months thereafter consists of a forty-nine minute period of instruction on these sixty-four punitive articles. The instructors need not be attorneys, nor do they seem to be provided with any regulatory guidance as to what constitutes a "careful explanation" of the statute.[9] The problem is not merely that the training time is woefully short, but more importantly that a careful explanation would require an exposition of all of the case law and *Manual* provisions interpreting Article 134. Even if such a careful explanation were possible within a reasonable period of training, it would still not satisfy constitutional notice requirements, however, because of the open-ended nature of the Article. Thus, even Article 137, the statutory notice provision, is inadequate to transform Article 134 into a statute which gives fair warning of its proscription.

Based upon this analysis we submit that Article 134 is constitutionally infirm because it is drawn "in terms so vague that men of common intelligence must necessarily guess at its meaning. . . ." *Connally* v. *General Construction Co.*, *supra*, 269 U.S. at 391.

2. Article 134 fails to provide explicit enforcement standards.

The general article is vague not only because it fails to provide notice, but also because "men of common intel-

9. Army Regulation 350-212, "Training: Military Justice," 2 June 1972; Army Subject Schedule 21-10, "Military Justice (Enlisted Personnel)," 24 June 1969, Courses *A* and *B*.

ligence . . . differ as to its application." *Id.* As a concomitant to lack of fair warning to servicemen in general, the Article provides insufficient guidance to those who must enforce it. The standard here is whether the statute prevents arbitrary and discriminatory enforcement by providing "explicit standards for those who apply them." *Grayned* v. *City of Rockford, supra*, 408 U.S. at 108. In the military society, the ultimate "enforcer" of the Uniform Code of Military Justice is the commanding officer, at whatever level. Initially it is the "unit commander" who usually prefers charges and conducts the primary investigation by himself or through military policemen. *Manual*, paragraphs 29*b* and 32. Furthermore, it is a commander at some level who must determine what level of judicial or nonjudicial action is to be taken. Articles 15-20 and 34(a), Uniform Code of Military Justice. Thus, the threshold question is whether Article 134, the *Manual*, or case law circumscribes adequate standards so that the commander will know when and how to apply the Article.[10] For the reasons discussed *supra* at pages 6 through 18, the answer must be that there is insufficient guidance to prevent arbitrary and discriminatory enforcement. This conclusion is supported by the many occasions on which the military appellate courts have been required to decree that commanders' attempts to punish a variety of conduct under Article 134 were beyond the bounds of the statute.[11]

10. As appellee Avrech points out (Brief at 58), the government fails to address this vital issue in its brief.

11. The following conduct has been held to be not within either of the first two clauses of Article 134:

Court of Military Appeals: Exposure of the genitals to a group of men in the commanding officer's office, *United States* v. *Caune*, 22 U.S.C.M.A. 200, 46 C.M.R. 200 (1973); usury, *United States* v. *Day*, 11 U.S.M.C.A. 549, 29 C.M.R. 365 (1960); negligent indecent exposure, *United States* v. *Manos*, 8 U.S.C.M.A. 734, 25 C.M.R. 238

(Footnote continued on next page)

The requirement for providing ascertainable enforcement standards does not stop with the need for notice to the military commander. A statute may also be unconstitutionally vague if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsyl-*

(Footnote continued from previous page)

(1958); passenger in auto fleeing the scene of an accident, *United States* v. *Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956); negligent failure to maintain sufficient funds in a checking account, *United States* v. *Downard*, 6 U.S.C.M.A. 528, 20 C.M.R. 254 (1956); wrongfully refusing to testify before a Canadian coroner's inquest, *United States* v. *Siniger*, 6 U.S.C.M.A. 330, 20 C.M.R. 46 (1956); misappropriation of a government vehicle, *United States* v. *Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953).

Army Court of Military Review: Introduction of obscene pictures onto a federal reservation for personal use, *United States* v. *Schneider*, 27 C.M.R. 566 (ABR 1958); simple trespass, *United States* v. *Will*, 25 C.M.R. 674 (ABR 1958); occupying a hotel room with a female, *United States* v. *Walter*, 11 C.M.R. 355 (ABR 1953), *rev'd on other grounds*, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954); possession of another's ration card, *United States* v. *Johnson*, 5 C.M.R. 268 (ABR 1952).

Air Force Court of Military Review: Sniffing glue, where no intoxication is alleged, *United States* v. *Menta*, 39 C.M.R. 956 (AFBR 1968); burning one's own home, *United States* v. *Freeman*, 15 C.M.R. 639 (AFBR 1954), *pet. denied*, 4 U.S.C.M.A. 734, 16 C.M.R. 292 (1954); wrongfully being in a WAF dayroom (accused male) at 3 A.M., *United States* v. *Smart*, 12 C.M.R. 825 (AFBR 1953); ejecting a member of one's household in the early morning hours where no duty to support is alleged, *United States* v. *Francis*, 12 C.M.R. 695 (AFBR 1953), *pet. denied*, 3 U.S.C.M.A. 837, 13 C.M.R. 142 (1953); having introduced a German female onto a military post, failing to remove her, *United States* v. *Habbard*, 12 C.M.R. 492 (AFBR 1953); violation of foreign law, *United States* v. *Wolverton*, 10 C.M.R. 641 (AFBR 1953).

Coast Guard Court of Military Review: Removal of fuses from a fuse box, *United States* v. *Davis*, 27 C.M.R. 908 (CGBR 1958); possession of U.S. currency in the Philippines, *United States* v. *Rio Poon*, 26 C.M.R. 830 (CGBR 1958); possession of narcotics paraphernalia, *United States* v. *LeFort*, 15 C.M.R. 596 (CGBR 1954).

vania, 382 U.S. 399, 402-03 (1966). *See also Grayned* v. *City of Rockford*, *supra*. In trials by court-martial, the military jury must be instructed upon all of the elements of the offenses charged, including, in an Article 134 prosecution, whether the conduct charged is prejudicial to good order and discipline or service-discrediting. *Manual*, paragraphs 73*a*, 213*d*. By way of further definition, the instruction will invariably include the admonition that Article 134 does not contemplate "distant effects" but is limited to cases where the prejudice is "reasonably direct and palpable", and that conduct which is service-discrediting is that which "has a tendency to bring the service into disrepute or which tends to lower it in public esteem." Paragraphs 4-126, Department of the Army Pamphlet 27-9, "Military Judges' Guide", (1969). This "definition" suffers from the same vagueness as the statute and the *Manual*. Moreover, it requires a wholly subjective decision by military judges and court-martial members, each of whom will have his own concept of what type of conduct (if not every type), should be proscribed.

Appellants seem to suggest that the standard instructions assure that the prohibitions of Article 134 are concretized and thus prevent overbroad application. *See* Appellant's Brief in *Avrech* at 38. *See also* discussion, *infra*, at 23-24. To the contrary, these instructions illustrate the imprecision with which the statute may be applied at the whim of the commander, the military judge and the military jury. Even ascribing total good faith to all concerned, there is more than a fair risk that the prosecution for a given type of conduct will fall without the ambit of the statute. The military cases in this area[12] reflect the very real probability that those who enforce them will do so against conduct which

12. *See* note 11, *supra*.

is not illegal, due to the absence of sufficient standards or guidelines. *Gooding* v. *Wilson*, *Papachristou* v. *City of Jacksonville*, and *United States* v. *Reese*, *supra*.

It is insufficient to argue that appellate courts may eventually vindicate service members convicted improperly under Article 134; no one should be subjected to prosecution for conduct which is not illegal. Due process requires that the accused must be afforded adequate notice by the statute under which he is charged, not merely through its eventual interpretation years later by an appellate court. Article 134 does not provide that protection for the military accused, either at the time he is charged or at the time he is tried. Indeed, by submitting the question to the court members on decidedly vague instructions, the military practice gives fact-finders the unprecedented opportunity to make law through their findings of guilty. If executive legislation is prohibited, *United States* v. *McCormick*, *supra*, surely this Court will not sanction the establishment of a military common law of substantive crimes arrived at on an *ad hoc* basis by diverse court-martial juries.

Just as the soldier or sailor cannot reasonably determine what conduct is proscribed by Article 134, so the commander, military judge and court members are in the dark. The danger is that the latter group are charged with enforcing this statute to regulate the conduct of the former. This Court has never permitted the blind thus to lead the blind through the maze created by a vague penal statute. The strong constitutional policy against vagueness of this sort dictates a holding that Article 134 does not comport with the due process requirements of the Fifth Amendment because it does not give fair warning to the accused or his accuser. *Gooding* v. *Wilson*, *Papachristou* v. *City of Jacksonville*, *Coates* v. *City of Cincinnati*, *United States* v. *Cardiff*, and *Lanzetta* v. *New Jersey*, *supra*.

B. Article 134 is unconstitutionally overbroad.

Because it has the capacity for prohibiting a wide range of activities, both constitutionally protected and unprotected, Article 134 is unconstitutionally overbroad. We agree that the question of overbreadth is *usually* raised in the context of abridgement of First Amendment rights. (Appellant's Brief in *Avrech* at 35). However, the necessity for guarding against a "chilling effect" is not limited to the "free speech" area as appellant seems to urge. (*Id.* at 34-38). Thus, in *Coates* v. *City of Cincinnati, supra*, this Court reversed a conviction under a municipal ordinance which forbade "annoying conduct", because the statute *could* have encompassed both protected and unprotected conduct within the realm of freedom of assembly and association. *Id.*, 402 U.S. at 615. *See also Lanzetta* v. *New Jersey, supra.* Significantly, the Court in *Coates* did not look to the application of the statute to the conduct allegedly proscribed in that case:

> . . . It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech. *Id.*, at 616.

Thus, appellant's attempt to narrow the issue here to the application of Article 134 to "disloyal statements" must fail. The issue is rather whether the statute is overly broad *on its face* because it "abut[s] upon sensitive areas of basic First Amendment freedoms". *Grayned* v. *City of Rockford, supra*, 408 U.S. at 109. The inquiry is not whether a "chilling effect" has actually occurred in the case at bar, but whether the challenged statute has an unconstitutional po-

tential for such an effect when viewed on its face. *See Gooding* v. *Wilson, Coates* v. *City of Cincinnati,* and *Dombrowski* v. *Pfister, supra.*

When viewed on its face, even considering the specific listing of possible offenses in the *Manual* the conclusion is inescapable: a statute which proscribes "any conduct" prejudicial to good order and discipline or service-discrediting, is so broad in sweep that it may very well reach conduct which is protected under the First Amendment. This Court need never reach the question of whether Levy and Avrech engaged in protected activities. Their convictions must fall on the threshold ground that the statute on its face may intrude upon constitutionally protected conduct or speech. *Coates* v. *City of Cincinnati,* and *Gooding* v. *Wilson, supra.*

C. No countervailing military necessity.

We recognize that due to the exigencies of military service, including the need for effective discipline and combat-readiness, the serviceman may not enjoy quite as broad a First Amendment freedom as do other citizens. However, the Court of Military Appeals has held that where these circumstances exist an abridgement of First Amendment freedoms may not be justified merely on the assertion that the military is "different". Rather, the special need of the military must be clearly demonstrated. *United States v. Priest,* 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972).[13] This *ad hoc* approach demonstrates the over-

13. The Court of Military Appeals has made clear that servicemen are entitled to the protections set forth in the Bill of Rights, particularly the guarantees of free speech and assembly contained in the First Amendment. *United States* v. *Priest,* 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972); *United States* v. *Gray,* 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970); *United States* v. *Daniels,* 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970); *United States* v. *Howe,* 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967). *See* Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service,* 35 Notre Dame Lawyer 491 (1960).

broad sweep of Article 134, because those who contemplate certain action or speech are unable to determine whether their conduct will fall within the ambit of the statute. In this sense, the overbreadth of Article 134 is truly a symptom of its vagueness.

While the parties to these cases have well described the application of the general article to the offenses charged against Avrech and Levy, we submit that as a matter of sound policy this Court should not permit the statutes to stand due to their *facial* overbreadth. To hold otherwise would be to retreat unnecessarily from the standards of specificity and narrow drafting which this Court has required of statutes which have the potential for abutting upon the personal freedoms of the citizenry. *Gooding v. Wilson, supra; N.A.A.C.P. v. Button*, 371 U.S. 415 (1963). Even considering the obvious need for order and discipline in the military setting, the statute as presently worded is too broad to comport with constitutional due process requirements.

D. The effect of unconstitutionality.

Obviously, because of the number of offenses charged in the past under this Article, a ruling by this Court that Article 134 is unconstitutional will have a sweeping effect on the military justice system.[14] However, the military should be ready. The first warning came from this Court in

---

14. We will not address in detail the difficult problem of retroactivity or prospectivity. However, a sensible solution to the "floodgate of litigation" problem would be that adopted in *Levy* that application of the decision is "prospective only except as to those cases where (1) the issue was raised and preserved and (2) was pending in the military judicial system or pending in the federal court system on this date [footnote omitted]." *Id.*, 478 F.2d at 796.

O'Callahan v. *Parker*, 395 U.S. 258, 266 (1969) when Justice Douglas asked, in *dictum*, whether the "prejudicial conduct" provision in Article 134 satisfied civilian courts' standards of vagueness. Later in *Levy* v. *Parker*, 396 U.S. 1204-05 (1969) Justice Douglas, acting on appellee Levy's application for release pending appeal, noted that the Court in *O'Callahan* had "reserved decision on whether Article 134 satisfies the standards of vagueness required by due process. Then, in a speech presented in 1972, the Chief Judge of the U.S. Army Court of Military Review, a former Judge Advocate General, Major General Kenneth J. Hodson, recommended discarding Article 134 because its use could not be defended by the military in a modern society. Moreover, he predicted that this Article could not withstand the attack now made in this Court. Hodson, *Perspective, the Manual for Courts-Martial, 1984*, 47 Mil. L. Rev. 1 (1972).

General Hodson is not alone among respected authorities suggesting the abolition of the general article. In the *Annual Report of the U.S. Court of Military Appeals and the Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation Pursuant to the Uniform Code of Military Justice for the period January 1, 1972 to December 31, 1972*, it is acknowledged that "despite almost 200 years of constitutional history and precedent, [there is] no assurance that the Article will withstand further appellate examination. There is therefore a need for early congressional consideration of the problem." (*Id.* at 2). This sense of urgency is also reflected in the Report of the Department of Defense Task Force on the Administration of Military Justice in the Armed Forces (1972), which recommends codification of offenses currently tried under the first two clauses of Article 134 and expresses concern that the vagueness and breadth of Article 134 make it subject to abusive applica-

tion (Volume II at 79). *See also* Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hastings L.J. 259 (1971). *But see* Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 A.B.A.J. 357 (1968).

When the views of those who daily administer military justice are considered, it becomes clear that there is no justification for not codifying offenses now charged under Article 134 in order to provide fair warning, an ascertainable standard of enforcement, and statutes sufficiently narrow that they do not impinge upon constitutionally protected conduct or speech. We agree with the conclusion of Judge Aldisert in the *Levy* case:

> . . . [T]here exist no countervailing military considerations which justify the twisting of established standards of due process in order to hold inviolate these articles, so clearly repugnant under current constitutional values. 478 F.2d at 796.

For these reasons, Article 134 should be held unconstitutionally vague and overbroad.

POINT II

Article 133 is unconstitutional on its face.

Article 133 proscribes "conduct unbecoming an officer and a gentleman." We submit that on its face Article 133 suffers from the same unconstitutional vagueness and overbreadth as Article 134. Indeed, much of the discussion of the standards concerning Article 134 is pertinent here, and the arguments concerning fair warning, potential for arbitrary enforcement and overbreadth need not be repeated.

Even assuming that Congress may validly legislate against conduct which is "unbecoming", the question inherent on the face of Article 133 is what sort of conduct is unbecoming to an officer and a gentleman? Since the statutory language gives no answer we submit that *ipso facto* it fails to meet constitutional notice requirements. *See Lanzetta* v. *New Jersey, supra.* Nonetheless, appellant urges this Court to consider the content of the statute "by reference to the well-settled traditions and customs of the military." (Appellant's Brief in *Levy* at 40.) The argument runs that "to military officers, [Article 133] sufficiently specifies what conduct it prohibits to satisfy the constitutional requirement that criminal statutes not be unduly vague." *Id.* This argument apparently is designed to meet the objection that those who administer the Article, as well as those who may be ensnared by its provisions, have a special degree of knowledge which fills the void left by the statute on its face. Where, then, does this knowledge come from?

The *Manual* offers little enlightenment. If an officer turns to paragraph 212 to determine whether to charge a fellow officer under the Article (or whether to engage in certain conduct himself) he is advised that:

> . . . Not everyone is or can be expected to meet ideal moral standards, but there is a limit of tolerance below which the individual standards of an officer, cadet or midshipman cannot fall without seriously compromising his standing as an officer, cadet or midshipman or his character as a gentleman. This article contemplates conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising.

If he desires further specificity about what will "compromise" either his official or personal moral standing, the officer is advised only that

> There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, indecency or indecorum, or of lawlessness, injustice or cruelty.

Finally, a catch-all sentence advises caution because ıe Article

> includes acts made punishable by any other article provided these acts amount to conduct unbecoming an officer.

'he *Manual* lists eight "instances" of violation, but obiously this list is merely illustrative, for the statute has een used to sweep many different types of conduct within s grasp.[15]

Being thus unsatisfied, the officer must then consider rior interpretations by military courts. Of course, as oted above with respect to Article 134, that inquiry will lso be unsatisfactory because the statute may be used to roscribe conduct which has not theretofore been the subect of a reported decision.

Finally, the officer is urged to consider the "customs and raditions" of the military service, perhaps by reference to ommercial publications such as *The Officer's Guide*.[16] Resort to publications of this sort, and to an amorphous ody of tradition places the officer in no better position han he was at the beginning of his inquiry: he is still nable to find a definition of what type of conduct is "unecoming" to an "officer and a gentleman"; he is still nable to find a definition of what is a "gentleman." To rge reference to the moral codes of the past is to fail to

15. *See generally*, Note, *Taps for the Real Catch-22*, note 3 *supra*, t 1526-27.

16. Reynolds, *The Officer's Guide* (1969), which has been in opyrighted publication since 1930.

appreciate the plain fact that the armed services of the 1970s are *not* the armed services of the 1870s. Even if moral standards may be the subject of Congressional control, the standards must be updated to conform to the *modes* of the times. On this regard we note a seemingly self-defeating argument by appellant in *Levy*:

> What is involved here is a system of values which has been part of the military experience for centuries. While these values are communicated to officers through military customs and usage, by example, they cannot be exhaustively codified without bringing the standard of conduct expected of officers "down to the requirements of a criminal code." (Appellant's Brief in *Levy* at 43).

That position demonstrates the very constitutional problem inherent in Article 133. It is part of a criminal code and yet purports to punish officers for failing to meet standards which somehow come to his knowledge by "example" from his predecessors through "military experience." While that approach may be satisfactory for exacting administrative penalties for improprieties (cf. *Letter Carriers, supra*), it is hardly sufficient to meet the requirements of specificity for conviction by court-martial, a federal criminal court. Contrary to appellant's position in *Levy*, the military services will not be precluded from holding officers to traditional high standards of conduct if Article 133 is struck down as vague (Brief at 43). Rather, the prohibition will be against imposing *criminal* penalties without sufficient notice of an ascertainable standard of criminal culpability. Indeed, if the traditions and customs of the service are as well-defined and relevant today as appellant claims (Brief in *Levy* at 44), the military should have little difficulty in drafting regulations or statutes which meet constitutional requirements of specificity.

As with the general article, Article 133 "leaves judges d jurors free to decide, without any legally fixed stanrd, what is prohibited and what is not in each particular se." *Giaccio* v. *Pennsylvania, supra*, 382 U.S. at 402-; *Grayned* v. *City of Rockford, supra.* Here the court embers are instructed that as an element of proof they ust determine that "under the circumstances the accused's nduct was unbecoming an officer and a gentleman." Furer, the officer jurors are advised that " 'unbecoming,' as ed in this specification refers to behavior which is not erely inappropriate or unsuitable, as being opposed to od taste or propriety or not consonant with usage, but *orally unbefitting and unworthy.*" Paragraph 4-122, epartment of the Army Pamphlet 27-9, *supra.* (Emphasis ded.) *See Manual* paragraph 212. Thus, each courtartial member is left to his own devices to determine what norally unbefitting and unworthy" conduct is. No furer standard is offered in the jury instructions, which unubtedly result in the type of *ad hoc* adjudication of guilt hich this Court has found constitutionally unacceptable. *oding* v. *Wilson*, *Papachristou* v. *City of Jacksonville*, d *Lanzetta* v. *New Jersey, supra.*

An additional vice in the use of Article 133 in criminal osecutions is that it is designed to be used as punishment r "acts made punishable by any other article, provided ese acts amount to conduct unbecoming an officer and a ntleman." *Manual* paragraph 212. For example, in the *vy* case, appellee was charged with violations of Article 3 and 134 for what was essentially the same conduct. nother example is found in paragraph 212 of the *Manual*: commissioned officer who steals property violates both is article and article 121." Is there a rational reason r this multiplication of charges? Presumably "ease of nviction" is the answer, because if the prosecution case ffers a failure of proof it might nonetheless establish

"conduct unbecoming" on facts which might not rise to the level necessary to establish commission of the substantive crime charged. However, "ease of conviction" is an unacceptable substitute for specificity in a criminal statute. *See* Note, *Taps for the Real Catch-22*, note 3 *supra*, at 1535. This potential for unreasonable multiplication of charges against an officer offends not only constitutional requirements of fairness; it seems as well to violate the provisions of Paragraph 26*b* of the *Manual* forbidding such pleading.

Finally, Article 133 suffers from the same facial overbreadth as does Article 134. Appellant's position (Brief in *Levy* at 44-47) notwithstanding, the constitutionality of the statute does not turn on whether Captain Levy's language may not have been protected speech under the circumstances. Rather, this Court's concern should be that the statute itself contains no real boundaries, and may very well cover conduct or speech which is protected by the First Amendment. *See Coates* v. *City of Cincinnati*, *supra*. Indeed, the very fact that it has been used in *Levy* as a sword against even unprotected conduct demonstrates its capability for use against speech that will ultimately be declared protected. *See United States* v. *Howe*, *supra*. The "chilling effect" here is obvious. If the military wishes to set boundaries of speech for its officers it should do so within constitutional limits to avoid encroachment into protected areas. This strict requirement in the First Amendment area is not met by the terms or application of Article 133. *Gooding* v. *Wilson*, supra.

We fully recognize the necessity for a high standard of conduct on the part of officers in our armed forces. Indeed, their example and leadership are often the means by which lives are saved in combat, and it is only through an effective officer corps that a military institution can function effectively. However, this valid policy require-

ment must be accomplished by communicating to our officers in clear statutory language what standards are expected. This is particularly so if officers are to be subjected to criminal penalties and a federal conviction for failing to comply with the standards. Thus, as a matter of sound judicial policy, Article 133 must be held violative of constitutional due process because on its face it is vague and overbroad.

CONCLUSION

For the foregoing reasons, the Association of the Bar of the City of New York, *Amicus Curiae*, respectfully urges this Court to affirm the judgment of the Court of Appeals in *Avrech*, and at least so much of the judgment of the Court of Appeals in *Levy* that holds Articles 133 and 134 unconstitutional.

Respectfully submitted,

THOMAS M. COMERFORD
1301 Avenue of the Americas
New York, N. Y. 10019

DAVID L. FOX
280 Park Avenue
New York, N. Y. 10017

MARVIN M. KARPATKIN
1345 Avenue of the Americas
New York, N. Y. 10019

LEONARD P. NOVELLO
1 Chase Manhattan Plaza
New York, N. Y. 10005

Attorneys for the Association of the Bar of the City of New York

Dated: New York, New York
February 1974